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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ERIC CONNOLLY, et al.,

4 Plaintiffs,

5 v.

11 CV 606 (RJS)

6 CEM KINAY, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
May 12, 2011
10 9:10 a.m.

11 Before:

12 HON. RICHARD J. SULLIVAN

13 District Judge

14 APPEARANCES

15 PRYOR CASHMAN LLP

Attorneys for Plaintiffs

16 BY: TODD E. SOLOWAY

JOSHUA D. BERNSTEIN

ERIC D. DOWELL

17 LOUIS F. BURKE PC

18 Attorneys for Defendants Cem Kinay, Marjorie Kinay,
Mer Insaat, Halis Sumer

19 BY: LESLIE S. WYBIRAL

20 THE LAW OFFICE OF SHELDON EISENBERGER

Attorneys for Defendants Dellis Construction, Stephen Katz

21 BY: SHELDON EISENBERGER

ELLIOT HAHN

22 BAACH ROBINSON & LEWIS PLLC

23 Attorneys for Defendant Receiver William Tacon, TTUTC

24 BY: ERIC LEWIS

JOSEPH L. RUBY

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1 APPEARANCES (Continued)

2 WINSTON & STRAWN LLP

Attorneys for Defendants Mandarin Oriental Hotel Group,

3 Mandarin Oriental Management

BY: MICHAEL S. ELKIN

4 THOMAS P. LANE

5 RIVKIN RADLER, LLP

Attorneys for Defendant Avatar Real Estate

6 BY: ERIK K. LINDEMANN

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1 THE DEPUTY CLERK: This is 11 CV 606, Connolly, et al.
2 v. Kinay, et al.

3 For the plaintiffs?

4 MR. SOLOWAY: Good morning, your Honor.

5 Todd Soloway, Joshua Bernstein and Eric Dowell from
6 Pryor Cashman for the plaintiffs.

7 THE COURT: You are Mr. Soloway?

8 MR. SOLOWAY: Yes.

9 THE COURT: Mr. Bernstein and Mr. Dowell, good
10 morning.

11 For the defendants, why don't we take them in order on
12 the claims, I think is probably the easiest way; is that how
13 you have arranged yourselves?

14 MS. WYBIRAL: My name is Leslie Wybiral, from the law
15 firm of Louis F. Burke PC, and I represent defendants Dr. Cem
16 Kinay, his wife Marjorie Kinay, Halis Sumer and Mer Insaat.

17 THE COURT: Ms. Wybiral, good morning.

18 Next is Dellis, Mr. Eisenberger.

19 MR. EISENBERGER: Good morning, your Honor.

20 Sheldon Eisenberger of the Law Office of Sheldon
21 Eisenberger, Elliot Hahn from my office and we represent
22 Stephen Katz as liquidator for Dellis.

23 THE COURT: Mr. Eisenberger and Mr. Hahn, good
24 morning.

25 Mr. Hahn, I don't see a notice of appearance from you.

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1 If you are going to appear on this matter, file one.

2 MR. EISENBERGER: Yes.

3 THE COURT: Next is William Tacon.

4 MR. RUBY: Your Honor, my name is Joseph L. Ruby.

5 And with me is Eric Lewis and we were here for
6 Mr. Tacon and for Trinidad and Tobago Unit Trust Corporation or
7 TTUTC.

8 THE COURT: Good morning to each of you.

9 The next defendant who has not yet had anybody stand
10 up is Mandarin Hotel International and other Mandarin entities.

11 MR. ELKIN: Good morning, your Honor.

12 Mike Elkin.

13 With me is Thomas Lane. We represent the two Mandarin
14 entities.

15 THE COURT: Good morning, Mr. Elkin, Mr. Lane.

16 Is that everybody? No.

17 MR. LINDEMANN: Good morning, your Honor.

18 My name is Eric Lindemann. I am from Rivkin Radler
19 LLP for Avatar.

20 THE COURT: Mr. Lindemann, good morning.

21 I have been collecting paper on this. I have assorted
22 letters, probably too numerous to go through on the record. I
23 have letters from virtually all of the defendants and groups of
24 defendants contemplating motions to dismiss for a variety of
25 reasons. I also have some joint letters and not joint letters

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1 with respect to what the case is about in response to my
2 standard scheduling order and proposed case management plan. I
3 have several of those rather than one joint one which is not
4 usually the way that it is supposed to work, but I guess this
5 is not a typical case. So I think it is worth talking about
6 the contemplated motions.

7 I should say at the outset that I have this process.
8 I have this premotion requirement because I think it is useful,
9 frankly, to flesh out some of the issues and talk a little bit
10 about some of the motions before moving straight into briefing.

11 I think it is not the Court's place to tell anyone
12 they can't make a motion, so I wouldn't presume to do that. I
13 do, on the other hand, think it could be valuable to get the
14 preliminary arguments and authority that you are relying on, to
15 review those things, to do some of my own research and to give
16 you at least a preliminary sense of where I think the issues
17 fall. So I am inclined to do that now, and we will see where
18 that takes us.

19 A variety of arguments are made with various different
20 defendants. Let's start with the contemplated motion to
21 dismiss for lack of subject matter jurisdiction. That motion
22 is contemplated by the Mandarin defendants, what I have been
23 calling the UTC defendants, the Kinay defendants, the Dellis
24 defendants and not Avatar -- and maybe I have forgotten
25 somebody else.

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1 This case, the jurisdiction here is based on
2 diversity, according to the complaint, however, I think the law
3 is pretty clear, diversity is lacking where the only parties
4 are foreign entities or where on one side there are citizens
5 and aliens and on the other side there are only aliens. That
6 is the Second Circuit in one case that recently covered that.
7 It was Universal Licensing Corp v. Paola Del Lungo. It is 293
8 F.3d at 579.

9 In this case, the defendants argue that the U.S.
10 citizen plaintiffs, the individual plaintiffs, are not real
11 parties in interest, that each U.S. citizen plaintiff actually
12 invested in the development through a Turks and Caicos
13 corporation, and that seems to be borne out by the complaint.
14 I am not sure that that is in dispute or not. It is very clear
15 under New York law that for a wrong against a corporation, a
16 shareholder has no individual cause of action even though he
17 loses the value of his investment or incurs personal liability
18 in an effort to maintain the solvency of the corporation. That
19 is Judge Keenan.

20 Judge Batts in another case has noted, it has long
21 been the law of New York and this circuit that a corporation
22 cannot pierce the corporate veil it created for its own
23 protection whenever doing so would be to its own benefit. You
24 basically cannot pierce your own corporate veil.

25 It seems to me very likely that the individual

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1 defendants who would be dismissed out of this case, which would
2 leave only foreign corporations which I think then would
3 destroy diversity jurisdiction in this case, so I think there
4 is a very strong likelihood that on subject matter jurisdiction
5 grounds this case would be dismissed.

6 I am happy to hear from plaintiffs on that, but that
7 is my initial preliminary take on this. The fact that some
8 individual plaintiffs were injured because they invested moneys
9 into these properties and the fact that they won't have the
10 benefit of using those properties that they hoped to live in or
11 at least vacation in, I don't think, changes the analysis.
12 Honestly, if you create a foreign corporation and that
13 corporation is what invests in the properties, the fact that an
14 individual is the source of the funds, I don't think changes
15 the analysis.

16 Who is going to cover this, Mr. Soloway?

17 MR. SOLOWAY: Yes. Thank you, your Honor.

18 And I appreciate your Honor's points. This is helpful
19 to us.

20 THE COURT: We will see how helpful it is, but go
21 ahead.

22 MR. SOLOWAY: Your Honor, we have cited to you, I
23 think in our letters to you about this particular point, that
24 the individual plaintiffs -- each one of these entities --
25 let's just step back.

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1 Each one of these entities are single-purpose entities
2 with one shareholder, each of the individuals behind or in
3 conjunction with each one of these companies. They are in the
4 complaint. I think that they are actually alleged in the
5 caption -- individual company, individual company.

6 THE COURT: I get that.

7 MR. SOLOWAY: The law that we have cited to you in the
8 Krieger case from this district in 2005 standing for the
9 proposition that even where there's a corporate structure,
10 where the individual plaintiff's injury is direct, the fact
11 that the corporation may also be injured --

12 THE COURT: What is the distinction between the injury
13 to the corporation and the injury to the individual?

14 MR. SOLOWAY: Here, the fraud would be perpetrated
15 upon the individuals. They were induced here to enter into
16 these agreements in the first place, which they never would
17 have entered into but for the fraudulent inducements that were
18 engaged in here. So we have both fraud in the inducement
19 before this agreement ever comes into play, and these entities
20 never would have owned these properties but for that situation,
21 and the fraud was clearly directed at the individuals --

22 THE COURT: Corporations can only act through
23 individuals. If IBM bought one of these things and the CEO had
24 hoped to live in one for a vacation, he would have a cause of
25 action? No. That is a silly example. The answer, of course,

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1 is no.

2 The individual plaintiffs created corporations for the
3 purpose of investing. It is those corporations that are the
4 parties to these arrangements, right?

5 MR. SOLOWAY: The corporate entities were formed after
6 the misrepresentations -- at least some of the
7 misrepresentations that are at issue here were made. So these
8 corporate entities would never have come into play except for
9 misrepresentations made and having been induced to enter into
10 the situation. In fact, your Honor, you will see that these
11 corporate entities bought at various times in the time
12 spectrum. Some of the individuals will have more
13 misrepresentations just based on the chronology than others.

14 I also wanted to add to your Honor that, in this
15 situation, factually, all of the moneys that were transacted
16 here -- personal moneys, the corporations -- none of these
17 corporations ever had any money. The moneys were paid
18 directly. I understand your Honor's point. This isn't IBM,
19 though.

20 THE COURT: If I had bought a piece of property and my
21 Aunt Millie gave me the money and the whole thing goes kaput,
22 my Aunt Millie has a cause of action because she is the one who
23 put up the cash?

24 MR. SOLOWAY: No, your Honor. That is not what I am
25 saying here. What I am saying here, we have a single-purpose

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1 entity that never would have been formed in the first place.
2 Then it was formed. And these single-purpose entities are
3 meeting, relying upon a regular basis, the representations that
4 are made by various parties to have them fund personal moneys
5 going forward. And those individuals were the ones induced by
6 the fraud. If we were saying here that this was strictly a
7 breach of contract claim, I could see it that way, but this is
8 a fraud directed at people, not just at companies.

9 These entities were formed at closing for the sole
10 purpose of acquiring the land that the individuals were induced
11 to acquire. So you have individuals who were standing out in
12 the street -- for example, the offering plan that is filed here
13 in New York with the attorney general, that was filed here for
14 this offering plan and is not directed at corporations; it is
15 directed at individuals. It is a disclosure so that individual
16 people who come before and say, OK, I want to buy. What am I
17 going to do? These disclosures were made to them. These
18 disclosures that were made, even in terms of the marketing and
19 the efforts that were made to have people proceed forward,
20 these were not directed at corporate entities. These were
21 directed at people who made decisions based upon what occurred
22 here.

23 I fully appreciate your Honor's point about, we set up
24 corporate entities. These corporate entities were set up for
25 one purpose, to acquire land. And then from there the

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1 misrepresentations were designed specifically towards the
2 people who the money was coming from, who made the decisions
3 based upon these representations. That is where we stand here.
4 We cite to you the case law standing for the proposition that
5 where the injury to the individual is direct, not through the
6 corporation but direct --

7 THE COURT: But, again, what makes it direct seems to
8 be that these are single shareholder corporations -- not
9 anything else.

10 MR. SOLOWAY: I think it is more than that, your
11 Honor. I appreciate your Honor's point about the Aunt Millie
12 point, but these were not simply situations where individuals
13 after the fact engaged in corporate formalities. These were
14 very personal interpersonal relationships designed to induce
15 people to enter into agreements in the first place. They never
16 would have formed these corporations in the first place. And
17 they never would have gone forward but for these
18 misrepresentations.

19 Then once you are in the chute, yes, you form a
20 corporate entity to own a piece of land, but then who is making
21 the individual payments here? The staged payments that were
22 tens of millions of dollars that were made here, were all wired
23 and, knowingly -- the people on the other side knew this --
24 were individual payments when they were communicating with
25 them, they were communicating with the individuals directly.

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1 Get your money to us. You have to do this. And they made all
2 of these representations to the community of villa owners for
3 the purpose of getting them to personally make these payments.

4 These corporate structures were solely for the purpose
5 of owning this land, period. The individual harm here is real.
6 Each one of these people came out-of-pocket millions and
7 millions of dollars here.

8 And the interrelations, I think your Honor sees from
9 the complaint, we spent a lot of time investigating the history
10 of this before we brought this claim. The individuals here
11 were specifically targeted to be the ones who would keep this
12 thing going while other people put money in their pockets here.

13 THE COURT: Let me hear from the defendants here.

14 Thank you, Mr. Soloway.

15 MR. RUBY: Your Honor, I am Joe Ruby for UTC.

16 I think you raised this point. If nobody objects, I
17 will start on this issue. Your Honor, the plaintiffs include
18 the individual defendants and the Turks and Caicos
19 corporations.

20 THE COURT: Right.

21 MR. RUBY: All the Turks and Caicos corporations are
22 plaintiffs, and the injury they allege is identical to the
23 injury alleged by the individual defendants, that is, there is
24 no injury alleged by any individual defendant other than the
25 injury that is alleged to have occurred through the

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1 corporation. They are pled precisely together. And under New
2 York law, that means that the individual has no standing to
3 raise the claim. If the claim of the individual is identical
4 to the claim of the corporation, then the claim belongs to the
5 corporation, and that is the holding of the Krieger case that
6 plaintiffs just cited to you.

7 THE COURT: What about when, as Mr. Soloway pointed
8 out, the fraud begins with individuals before the creation of
9 the corporation? Is that a distinction that matters?

10 MR. RUBY: I don't think it is, your Honor.

11 First of all, the fact that the fraud, the alleged
12 fraud is directed at the individuals clearly doesn't matter.
13 And Krieger says that, and there are many cases that say that.

14 Now, we don't have any case law on the creation of the
15 corporation, but plaintiffs do not allege that any of the
16 defendants induced them to create these corporations. They
17 don't allege that the corporations themselves, that the
18 existence of the corporations is an element of the fraud. In
19 fact, there are plaintiffs who live in Switzerland who didn't
20 use corporations and they are plaintiffs too. They don't
21 allege anything about how they had to be induced to make a
22 corporation to be defrauded. That was not part of the alleged
23 scheme.

24 The corporations were set up for -- I don't know what
25 reasons -- reasons having to do with financial interests of the

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1 plaintiffs. They are not alleged to be a part of the scheme.
2 And they are legitimate real corporate entities, and the
3 plaintiffs don't allege any differently. In fact, the
4 plaintiffs' lawyers are alleging in court that they are legal
5 entities who do have a right to recover the exact same moneys
6 that the individual plaintiffs have a right to recover. Nobody
7 on this part of the "V" is alleging that there is no remedy.
8 The remedy for the individuals is exactly -- if they can prove
9 their case -- the same as the remedy for the corporations. In
10 fact, all 21 causes of action are pled on behalf of all 19
11 plaintiffs --

12 THE COURT: I think that is right. That is certainly
13 my reading of it. There is no fraudulent inducement cause of
14 action. There is a fraud, but there is not a fraudulent
15 inducement claim.

16 MR. SOLOWAY: I think we have pleadings to that
17 effect. I don't know if we specified separately fraud in the
18 inducement.

19 MR. RUBY: There is no fraud in the inducement claim.

20 THE COURT: Paragraph 344 which is the first cause of
21 action which is styled as "fraud" talks about how certain of
22 the defendants made numerous misrepresentations to each of the
23 plaintiffs for the purpose of inducing all of them to purchase
24 in the first place and then continue to make installment
25 payments. So it does seem to me that every cause of action is

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1 pled with respect to every claim here.

2 You don't disagree with that, do you, Mr. Soloway?

3 MR. SOLOWAY: No.

4 THE COURT: Any other defendants want to be heard?

5 Are you done?

6 MR. RUBY: I am done, your Honor.

7 Thank you.

8 THE COURT: Any other defendants wish to be heard on
9 that point?

10 Mr. Soloway, anything you want to say in response?

11 MR. SOLOWAY: I do just want to note that, in terms of
12 inducement, the concept, what would the relief be if you were
13 fraudulently induced to enter into an agreement? You would be
14 put back to the status quo ante without a corporation, because
15 the corporations were only formed at closing. So here if there
16 was an inducement, the inducement is clearly to the individual
17 because the corporation never would have existed but for those
18 frauds.

19 THE COURT: But, again, I don't think you have pled a
20 distinct fraudulent inducement claim. I suppose that you could
21 amend, but I don't think that you have now.

22 Let's move on to some of the other points raised.

23 Another point raised is lack of personal jurisdiction.

24 Before I get to that one, I think it makes sense to go
25 to forum non conveniens which everybody except, sort of, Avatar

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1 makes this argument. Avatar's is really a motion to transfer
2 to Florida as opposed to a motion to dismiss for forum non
3 conveniens grounds. But forum non conveniens basically
4 involves a three-step process, and I think most of you are
5 familiar with that. I am not going to go into it in great
6 detail.

7 The first issue is how much deference to give to
8 plaintiffs' choice of forum. It seems to me that the deference
9 accorded here is probably the intermediate level of deference
10 at best.

11 The second test is whether there is an adequate
12 alternative forum. And it seems to me that Turks and Caicos is
13 an adequate alternative forum. Certainly courts in this
14 district and elsewhere have found it to be an adequate forum.
15 It is not a corrupt sham of a justice system. I think it is
16 the case that the defendants will submit to service of process
17 in Turks and Caicos.

18 I want to make sure that is true of Avatar.

19 Is it?

20 MR. LINDEMANN: I believe so.

21 THE COURT: So then you get to sort of balancing the
22 public and private interests here. And although there seems to
23 be some dispute as to exactly what witnesses and what evidence
24 is where, it does seem to me that Turks and Caicos has the
25 better of the argument. This is where the property is. This

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1 is where virtually all of the defendants are. This is where
2 most of the plaintiffs are, even if you include the individual
3 plaintiffs, in other words, if I don't dismiss them. It seems
4 to me that Turks and Caicos has a pretty strong interest in
5 adjudicating these issues. Unless there is some good reason
6 not to be there, I think I would be likely to grant the motion
7 on forum non conveniens grounds, even if I didn't dismiss on
8 subject matter jurisdiction grounds.

9 I think that is sort of worth sharing with you,
10 although there may be some other facts here. A motion like
11 this often relies on some things that are outside of the
12 pleading.

13 Mr. Soloway, I am happy to hear you on forum non
14 conveniens as well, unless you are dividing up.

15 MR. SOLOWAY: No. You will hear from me.

16 Your Honor, I think we pulled out recently the
17 Coca-Cola decision that your Honor had issued. There you had
18 Guatemalan parties, Guatemalan injuries -- everyone was there
19 and coming here to assert claims.

20 Here, if there is one place where the majority of
21 people actually really are, it is here.

22 THE COURT: Why do you say that?

23 MR. SOLOWAY: I understand the corporate structures,
24 your Honor, but the individuals -- I can run through the list,
25 I think, although it is not fully set forth right now, at least

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1 a third of them actually live here and more of them have homes
2 here. The defendants, I don't think, with the exception of the
3 corporate structural names, are not in Turks and Caicos. No
4 one is in Turks and Caicos.

5 THE COURT: There are a lot of Delaware corporations
6 that are not in Delaware.

7 MR. SOLOWAY: I understand that, but as a practical
8 matter, no one is in Turks and Caicos.

9 THE COURT: Where is everyone then?

10 MR. SOLOWAY: Let's go through it.

11 The plaintiff Mr. Connolly lives in New York.

12 Mr. Razek lives in Ohio, but is in New York and has an
13 apartment in New York.

14 Mr. Walker lives in New York.

15 Mr. Galitsyn is a Russian citizen, but I know he is
16 back and forth.

17 Mr. Isaias is an Ecuadorian citizen.

18 Mr. and Mrs. Pictet, I believe, are Swiss.

19 Mr. Singh is British.

20 And Mr. Watts is from Texas, but he is back and forth.

21 THE COURT: What about Michael Topr?

22 MR. SOLOWAY: Mr. Topr is of Russian origin, but lives
23 in New York full-time.

24 THE COURT: Mr. Kinay?

25 MR. SOLOWAY: Mr. Kinay is in Florida, has multiple

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1 Florida addresses. We served him in Florida.

2 THE COURT: Keep going.

3 MR. SOLOWAY: Mr. Serim is Turkish. I believe he
4 lives in Turkey. I don't know for sure.

5 O Property Collection USA was served in Florida.

6 By the way, all of the O Property entities have not
7 appeared nor have the Turks entities, the Turks General
8 Partners, the Turks Holding, the Turks Limited -- none of them
9 have appeared. And all of those, as we have alleged in our
10 complaint, are merely shell entities that Mr. Kinay and his
11 partners exercised full dominion and control over.

12 We have the receivership there.

13 Marjorie Kinay is Florida.

14 Cenk Kinay is Turkey.

15 The SUU Hotels is a Turkish entity. I know they own a
16 hotel in Costa Rica.

17 The UTC, your Honor, without being presumptuous, I
18 assume we will deal with the personal jurisdiction arguments
19 there. They have funds and other entities that do business in
20 New York.

21 Mandarin Oriental, although they have alleged some
22 type of lack of personal jurisdiction, all we have to do is
23 walk over to Columbus Circle and look up.

24 And then we have Mer Insaat and Halis Sumer are
25 Turkish citizens, I believe.

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1 And Avatar is a Florida LLC.

2 As a practical matter, none of them are in Turks and
3 Caicos, and the majority of the plaintiffs -- not the majority,
4 a real number of the plaintiffs reside and live here or have
5 homes here.

6 THE COURT: You are talking about the individual
7 plaintiffs?

8 MR. SOLOWAY: Yes, your Honor.

9 MR. EISENBERGER: Your Honor, Dellis was skipped over.

10 MR. SOLOWAY: I'm sorry. I didn't mean to
11 discriminate.

12 MR. EISENBERGER: They are, I believe in Turks and
13 Caicos.

14 THE COURT: That is a different issue with respect to
15 the bankruptcy that we will come to.

16 MS. WYBIRAL: May I be heard?

17 THE COURT: Yes.

18 MS. WYBIRAL: Turks Limited was incorporated in the
19 Turks and Caicos June 10, 2005 and have registered offices in
20 Providenciales.

21 Dellis Construction was incorporated in Turks on
22 February 9, 2007.

23 The reason that the receivership is in Turks and
24 Caicos is because of Turks Limited and the Turks Development,
25 which is exactly the reason why Turks and Caicos would have

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1 more of a compelling interest in adjudicating this case because
2 I believe at least two cases -- three, actually -- have already
3 been brought there concerning this whole project for different
4 reasons but, nevertheless, there is a pool of litigation
5 concerning Dellis Cay.

6 THE COURT: All right. Any other defendants wish to
7 be heard with respect to forum non conveniens?

8 MR. ELKIN: Yes, your Honor.

9 Mike Elkin, Winston & Strawn for the Mandarin
10 defendants.

11 THE COURT: Wait. I believe I misidentified you.
12 You are?

13 MR. RUBY: I am Joseph L. Ruby.

14 THE COURT: Mr. Ruby, I referred to you as Mr. Elkin
15 before. I am sorry about that.

16 MR. ELKIN: It is a compliment, your Honor.

17 Very briefly, I appreciate Mr. Soloway's comment about
18 you can go to Columbus Circle and see Mandarin, but that is a
19 very facile approach here.

20 Let me just suggest, with respect to the two Mandarin
21 entities here, Mandarin Oriental Management BVI Limited is a
22 company incorporated under the Cayman Islands and it only does
23 business with respect to the Caribbean Islands. It has no
24 operations or activities here in the United States whatsoever.
25 The other entity which we believe was wrongfully sued, wasn't a

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1 signatory to the management agreement. The second one, the
2 Mandarin Oriental Hotel Group International Limited is a
3 company that has no business or activities here whatsoever. It
4 has to do with some foreign operational company within the
5 Mandarin Hotel Group. Again, there is no Mandarin-related
6 entity here that does any work for it. It is just an improper
7 party. The second party is based in Hong Kong and has no
8 operations or activity in the United States.

9 MR. RUBY: Your Honor, may I?

10 THE COURT: Yes.

11 MR. RUBY: Your Honor, for UTC and Mr. Tacon, first of
12 all, we would contend that the proper level of deference is
13 low. There were only three New York domiciled plaintiffs. We
14 don't think they are proper plaintiffs. The great majority of
15 plaintiffs are not New York domiciliaries. And the reason we
16 are here, we think, is forum shopping. When parties forum
17 shop, their choice is not entitled --

18 THE COURT: I understand. What I said was that I
19 thought it was, at best, intermediate. So I will stand by
20 that.

21 MR. RUBY: Secondly, your Honor, there was a
22 representation made about UTC, and I would like to clear it up.

23 Plaintiffs have made a mistake. They allege in the
24 complaint that UTC has a subsidiary company that is
25 incorporated in New York with a mailing address in New York,

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1 and that is a mistake. The company that they refer to, the UTC
2 North America Fund Incorporated is incorporated in Maryland and
3 has its U.S. mailing address in the state of Wisconsin. It has
4 no New York mailing address. It did, about 12 years ago, but
5 it doesn't now. It has never been incorporated in the State of
6 New York.

7 THE COURT: It has no offices or anything?

8 MR. RUBY: No offices, no employees, no agents, no
9 phone numbers. It doesn't actively do business in the State of
10 New York.

11 If a New York resident wants to invest in the fund, it
12 can do so, but it has to contact UTC through its administrator
13 in Milwaukee, Wisconsin.

14 So that is just an error. So we think that that goes
15 more to the personal jurisdiction than it does to forum non,
16 but there was a representation made to your Honor concerning
17 forum non, so I am jumping to that issue.

18 THE COURT: Well, there is some overlap between the
19 two issues.

20 MR. RUBY: Yes, indeed, there is.

21 With respect to the factors that are involved, your
22 Honor, all of these Turks and Caicos companies which have not
23 appeared have been sued. And if plaintiffs want to reconfigure
24 their case, they can do that. But as long as they are suing
25 them and those entities have decided not to appear --

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1 presumably, because they don't think there is jurisdiction over
2 them here, which is their right -- they should be taken into
3 account in the forum non analysis.

4 The complaint alleges that there was a very
5 substantial well organized conspiracy involving a great many
6 people, involving corporations in the Turks and Caicos Islands,
7 incorporated under Turks and Caicos law to defraud people from
8 around the world, most of whom are not in New York, by creating
9 an investment opportunity in the Turks and Caicos Island to
10 trap these unwary wealthy people and deprive them of their
11 money. And that is an issue of great importance to the
12 government of Turks and Caicos. It is an issue that has
13 created a commission of inquiry there. There are both civil
14 and criminal investigations going on in Turks and Caicos right
15 now into this transaction.

16 Our client, UTC, has sued and won a money judgment of
17 \$85 million against Mr. Kinay and Mr. Serim in the supreme
18 court of the Turks and Caicos Island.

19 We have a freezing order from the supreme court for
20 the Turks and Caicos Island over the assets of Mr. Serim and
21 Mr. Kinay

22 This is a Turks and Caicos Island centered dispute.
23 It is a matter of great public importance in the Turks and
24 Caicos Island. It is a matter of no importance to the State of
25 New York. If New Yorkers decide to go to a foreign country and

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1 incorporate corporations there and make investments through
2 those corporations there, that is certainly their right, but it
3 doesn't mean that the State of New York continues to exercise
4 its protection over them when they decide to do that. This is
5 a case perfectly adequate for the courts in Turks and Caicos
6 which are far less busy than this Court.

7 THE COURT: I will vouch for that.

8 MR. RUBY: It is a case that can be handled there by
9 very competent jurists --

10 THE COURT: More competent than here?

11 MR. RUBY: Your Honor, I am only reporting what I have
12 been told, that they are very competent. I have not tried
13 inquired, but we do believe that's where the case belongs.

14 THE COURT: Clearly, that's what you believe and many
15 of the points are ones that I have touched upon. And as I
16 said, I do think that there are strong arguments to be made
17 there and I am inclined, at least at this point, to grant the
18 motion on forum non conveniens grounds but, Mr. Soloway, I am
19 not going to shut you down.

20 MR. SOLOWAY: What happens when the reverse happens,
21 when a developer in Turks and Caicos comes and files an
22 offering plan in the State of New York to market property to
23 New Yorkers and registers with the attorney general of the
24 State of New York an offering plan and then proceeds to have
25 marketing events in South Hampton, in New York City, multiple

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1 events and comes into the jurisdiction to sell, and people rely
2 upon those representations and put their money down, millions
3 of dollars? We should stand behind the formality and say, they
4 decided to go there. I am really sorry. This should all be
5 heard in Turks and Caicos. These are New York people --

6 THE COURT: Some of them.

7 MR. SOLOWAY: Some of them. Your Honor, we frequently
8 have cases where there are multiple parties from lots of
9 places. That is not unusual.

10 THE COURT: I understand there is an analysis to be
11 made here. You are arguing that New York is really the center
12 of the locus of this, what is alleged in the complaint as a
13 fraudulent scheme and, obviously, Mr. Ruby is taking a very
14 different view and has asserted certain facts that are not part
15 of the complaint and are not part of the record at this point.

16 Do you dispute that this scheme is being investigated
17 in Turks and Caicos?

18 MR. SOLOWAY: There is no dispute about that, and that
19 scheme is also being investigated here.

20 THE COURT: By the New York attorney general?

21 MR. SOLOWAY: I don't know everybody, but I have
22 received a number of phone calls from a lot of people about
23 this matter. So there are frequently multiple locations where
24 a case can be brought. That doesn't mean it doesn't get
25 brought in one of them.

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1 THE COURT: I guess that the issue is why should it be
2 brought here and not in the Turks and Caicos. And, typically,
3 the analysis turns on the inadequacy of the alternative forum,
4 but you are not suggesting that, are you?

5 MR. SOLOWAY: I am not necessarily suggesting it is an
6 inadequate forum. What I am saying to you, your Honor, we have
7 a right to bring this case here. They came here to sell.

8 THE COURT: It is not about a right to bring a case.
9 It is about not whether one has a right to bring a case; it is
10 whether a case should properly be in one jurisdiction as
11 opposed to another. Under forum non conveniens, that is the
12 issue.

13 MR. SOLOWAY: Sure. On the forum non conveniens
14 point, there certainly is no difficulty -- this is not a
15 situation --

16 THE COURT: A large number of the defendants are not
17 here now, so there is some difficulty, right?

18 MR. SOLOWAY: All of these entities are Kinay
19 entities, and I can show you that in motion papers that all of
20 these entities were controlled by Kinay and Mr. Serim. They
21 were the shareholders. So they stand before you and say, well,
22 they probably are not here because they have the right to say
23 there is no jurisdiction, but they stand here in one capacity
24 but not in another.

25 THE COURT: You named a bunch of defendants and many

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1 of them are not here. If you are telling me that they are just
2 shells that don't matter, I guess that is worth knowing, but it
3 is not clear to me from the complaint whether that is true.

4 MR. SOLOWAY: Your Honor, this is a point for
5 lawyering that we frequently have to discuss. Is everybody
6 actually necessary here? There are some that may be and some
7 that may not be, but we have a broad fraud here and we have
8 alleged it, I respectfully submit, with great particularity --

9 THE COURT: I am not saying it should be dismissed for
10 lack of particularity. I am not suggesting that.

11 MR. SOLOWAY: My point being that you have multiple
12 parties here controlled by the same people who are perpetrating
13 this fraud. They are using these entities to funnel money back
14 and forth to each other. There are multiple instances in which
15 these various corporate entities are used by the individuals to
16 shuttle money back and forth to themselves.

17 A great example is the Avatar situation. Dellis
18 Construction Limited paid \$8 million to buy an apartment in
19 Miami. Then the injunction is issued out of the Turks and
20 Caicos. What happens? That week or within a month or so after
21 that, the apartment is sold by Dr. Kinay for under market
22 value, liquidating an illiquid asset, and the money is
23 distributed wherever.

24 So these companies were all used in various ways and
25 we have the details to back it up to show you that it has

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1 actually happened. And who does it affect? It affects these
2 people here who were marketed these apartments under an
3 offering plan filed with the New York State attorney general's
4 office.

5 I understand your Honor's comment about what the
6 intermediate level of deference given to where the plaintiffs
7 chose it, given the level of contacts that this project was
8 brought here to New York for sale, I respectfully submit, and
9 given the fact that where everybody actually is --

10 THE COURT: Where everybody actually is? You don't
11 mean --

12 MR. SOLOWAY: Where a variety of people are.

13 THE COURT: Where some people are. You can't say
14 everybody when you mean some. I understand your point, but
15 don't overstate it.

16 MR. SOLOWAY: I appreciate that, your Honor.

17 What is the point of filing, for example, an offering
18 plan with the attorney general's office? It is to insure that
19 New Yorkers -- because it is a state statute, the Martin Act --
20 are protected, not anyone else. And some of these people
21 bought as New Yorkers, and they were entitled to that
22 protection.

23 And the marketing events that were focused here -- I
24 think we have alleged in the complaint, there were multiple
25 statements by Kinay and his representatives that New York is

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1 the focus of this marketing event, of the marketing of this
2 property. It is a very limited number of lots and apartments
3 that are available on Dellis Cay. I have been there. So this
4 was focused on New Yorkers here. They were looking for us.

5 I respectfully submit, on everything I told your
6 Honor, that it is designed to insure that New York citizens are
7 protected, and that's why we are here.

8 THE COURT: I understand the point. It is really an
9 issue of balancing the forum non conveniens.

10 MS. WYBIRAL: May I be heard again?

11 THE COURT: You may.

12 MS. WYBIRAL: First of all, as far as the sale of the
13 Miami apartment and the money going who knows where, the money
14 actually went to pay off the mortgage on the property, and the
15 balance of it was sent to the Turks and Caicos lawyers,
16 pursuant to a court order, to be put under the control of the
17 receiver for distribution. So that's exactly where it went --
18 again, back to the Turks and Caicos.

19 I know about this plan filed in New York and,
20 supposedly, New Yorkers were targeted. But they formed Turks
21 and Caicos corporations, each of which entered into two
22 separate agreements, a lot sale agreement and then a villa
23 construction agreement. Each of those agreements had a
24 jurisdiction clause stating that this agreement is made and
25 shall be performed in the Turks and Caicos Islands. The

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1 parties consent to the exclusive jurisdiction of the supreme
2 court of the Turks and Caicos Island in respect of all matters
3 arising.

4 This clause was freely negotiated between the parties'
5 lawyers. Everybody was represented here. And there's no
6 reason for this Court to disturb the intent and agreement
7 between the parties to the operative contracts that any matters
8 that are disputed would be brought before the supreme court of
9 the Turks and Caicos.

10 THE COURT: I am certainly familiar with the forum
11 selection clause. It is choice of law clause, Turks and Caicos
12 law under the contract, right?

13 MS. WYBIRAL: Under both of them, yes.

14 THE COURT: But there is no breach of contract claim,
15 is there?

16 MR. SOLOWAY: That's correct, your Honor.

17 THE COURT: So your argument is that there is a broad
18 clause that includes anything, whether styled as contract or
19 tort pertaining to the property?

20 MS. WYBIRAL: They may not have alleged a breach of
21 contract claim, that doesn't vitiate the contracts from being
22 the operative agreements that they are, in other words,
23 underlying this entire action.

24 THE COURT: Anybody else want to be heard with respect
25 to forum non conveniens?

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1 Related to that, I suppose, is the lack of personal
2 jurisdiction and that one -- I think that we have covered some
3 of the points. There seem to be disputed facts with respect to
4 what exactly went on in New York and where companies are. I
5 don't know that that is something that I can resolve right now.
6 If there were to be motions, then I gather there would be
7 submissions and affidavits and other evidence that would be
8 made to enhance the record with respect to the issues
9 pertaining to personal jurisdiction.

10 Anybody want to be heard briefly -- I have something
11 else at 10 -- anything that they would like to say on lack of
12 personal jurisdiction that has not already at least been
13 touched upon in the other discussions we have had this morning?

14 MS. WYBIRAL: Yes, your Honor. I would just like to
15 point out another mistake in the plaintiffs' complaint, and
16 that is the fact that my client Dr. Kinay is not and never has
17 been a U.S. citizen. He has Turkish citizenship and Austrian
18 citizenship and that is where he resides.

19 THE COURT: You dispute that he is a Florida resident?

20 MS. WYBIRAL: He has never been a Florida resident.
21 Did you say that, Mr. Soloway? You said you served him in
22 Florida?

23 MR. SOLOWAY: Yes. We served him in Florida and his
24 wife in Florida. We have multiple addresses for them in
25 Florida, and we have evidence that they actually owned the

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1 property in Florida too.

2 THE COURT: So there seems to be a dispute as to where
3 he resides which I cannot resolve now, but good to know.

4 MR. SOLOWAY: I do want to mention one point about the
5 UTC, your Honor, in terms of their saying that there was a
6 "mistake" in our pleadings relating to the business that the
7 fund entities do in New York.

8 One week before they submitted the letter to your
9 Honor, they changed their SEC filing to take out a New York
10 address and to substitute in, I think, a Maryland address in
11 lieu thereof.

12 THE COURT: What should I infer from that?

13 MR. SOLOWAY: Particularly at this point, there is
14 certainly an issue about whether or not they are jerry-rigging
15 their jurisdictional argument to come to the Court and say, we
16 have no address here, we don't do anything here. The test that
17 your Honor set forth, I believe, in the Gem case that your
18 Honor had about a year and a half ago --

19 THE COURT: You are reading all of my cases.

20 MR. SOLOWAY: I am, and I am going to keep going. I
21 am not stopping.

22 But in that case your Honor talked about the mere
23 department test or an agency test for terms of jurisdiction
24 where you have a subsidiary doing business in New York.

25 And we have substantial evidence that:

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1 A) There was control by the UTC over its U.S.
2 subsidiary that does business in New York, that has banking
3 relationships in New York with specific banks.

4 We have multiple items of documentary evidence to
5 support their doing business in New York, including with
6 securities agencies with respect to their performance of
7 business in New York.

8 And they are fully controlled by the UTC. Two-thirds
9 of their assets are UTC assets.

10 The board of directors are overlapping between the two
11 companies.

12 And they act at the behest of UTC for its benefit.

13 We would argue to your Honor -- this is for personal
14 jurisdiction purposes -- that you can have jurisdiction of a
15 parent through the business of its subsidiaries under this mere
16 department or agency test. And we respectfully submit, your
17 Honor, that we would meet that standard.

18 THE COURT: But clearly what Mr. Ruby or Mr. Elkin --
19 I forget.

20 Mr. Ruby, you said this?

21 MR. RUBY: Yes.

22 THE COURT: He is disputing that there is any New York
23 connection, and the change in the SEC filing is the first I
24 have heard is what you mentioned, could be consistent with you
25 called their attention to the fact that they had old

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1 information in their SEC filing.

2 MR. SOLOWAY: Your Honor, in that regard --

3 THE COURT: I am not going to resolve that today.

4 MR. SOLOWAY: That's my next question. On these
5 topics where we have jurisdictional issues, do we get discovery
6 on those topics? It is your Honor's courtroom, I don't want to
7 be presumptuous, but we would like to get going with discovery.
8 That's what we would like to do here.

9 One of the items of dispute on the discovery issues
10 was that we want discovery to go forward while these motions
11 are pending and they don't, particularly on these issues where
12 we have jurisdictional issues, etc. Again, without being
13 presumptuous, we sort of laid that out there for you.

14 THE COURT: Before we get to that, I want to talk
15 about the bankruptcy issue.

16 Dellis, you have been very quiet, but Dellis contends
17 that it is currently engaged in a liquidation in Turks and
18 Caicos, and because under Turks and Caicos law, actions against
19 companies in bankruptcy may not proceed without leave of the
20 court, much like here, that the case against it should be
21 dismissed.

22 There certainly is good authority for U.S. courts
23 extending deference to foreign bankruptcy proceedings. That is
24 another Judge Keenan case, Sea Trade v. FleetBoston. So it
25 does seem to me that there is a strong argument there that this

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1 Court should accord deference to the foreign bankruptcy
2 proceeding.

3 Plaintiffs argue that under Turks and Caicos law,
4 actions involving companies in bankruptcy may continue as long
5 as the liquidator seeks leave of the Turks and Caicos court.
6 They contend, therefore, that Dellis should not be allowed to
7 benefit from its failure to seek that leave in Turks and
8 Caicos. The protection of the bankruptcy laws exist for a
9 reason. If plaintiffs were correct, then it would mean
10 basically that the bankruptcy protections would be virtually
11 gutted in every case, it seems.

12 I guess what I am saying is that, I am inclined to
13 show deference to the Turks and Caicos bankruptcy.

14 Mr. Soloway, do you want to be heard on that?

15 MR. SOLOWAY: Mr. Bernstein, if that's OK?

16 THE COURT: Fine.

17 MR. BERNSTEIN: Your Honor, it is our understanding
18 from Turks and Caicos practitioners, that not Dellis
19 Construction, but the liquidator of Dellis Construction,
20 Stephen Katz, who was appointed by the courts down there, is
21 the only person with standing to request permission to allow
22 the suit to go forward outside of Turks and Caicos. And it is
23 our understanding that these applications are routinely granted
24 and that liquidators, in their position as liquidators -- not
25 as the company -- routinely make those applications, and we

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1 have spoken to Mr. Katz about that.

2 THE COURT: Is Mr. Katz going to make that application
3 or not?

4 MR. HAHN: No, your Honor.

5 Do you want to hear from us?

6 THE COURT: Sure.

7 MR. HAHN: Mr. Katz, first of all, is aware of no such
8 requirement that he is the one that has to seek leave from the
9 Turks and Caicos court. I note that plaintiff has not cited
10 any authority for that proposition, but states this is their
11 understanding. Mr. Katz does not share that understanding.

12 In any event, even if plaintiffs were correct -- and
13 we certainly don't believe that they are -- Mr. Katz has
14 already made clear his intention to this Court and to plaintiff
15 that he has no intention of seeking leave.

16 The fact of the matter is that plaintiffs have not
17 complied with the requirements of the Turks and Caicos court
18 and, until they do so and until somebody seeks leave -- and Mr.
19 Katz doesn't believe he needs to do that and he doesn't intend
20 to do that -- the state provisions apply and this case should
21 be dismissed --

22 THE COURT: -- with respect to Dellis?

23 MR. HAHN: Correct.

24 And in the event that your Honor's orders for
25 discovery to move forward while these motions are pending, we

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1 would request that we be exempted from participating in
2 discovery because we think that that would violate the Turks
3 and Caicos statute.

4 THE COURT: I am not sure I could dismiss. I could
5 stay, I suppose.

6 MR. HAHN: I think there is case law going both ways,
7 you could dismiss or stay.

8 THE COURT: I have told you sort of what my
9 preliminary thinking is on these things. I reserve the right
10 to change my mind, of course. But I do think it is worth
11 sharing with you because I think plaintiffs should decide
12 whether it is worth having months of briefing and then months
13 of me trying to make sense of it all and then writing a pretty
14 opinion, or whether it makes sense just to do this in Turks and
15 Caicos where there seems like there is already a head start and
16 a head of steam that has been built up.

17 That may be something, Mr. Soloway, that you want to
18 consider with your clients in light of what we have discussed
19 today. Get a copy of the transcript, if you want. So I will
20 let you think about that.

21 I am not inclined to have discovery go forward with
22 respect -- I am really not inclined to have any discovery going
23 forward. It seems to me, I don't need additional discovery on
24 the subject matter jurisdiction. I am not sure I really need
25 much discovery in relation to forum non conveniens. The

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1 personal jurisdiction may require a little more, which is why I
2 focused on it less.

3 But I am inclined, frankly, if you want to make the
4 motion, I would stay discovery. There needs to be some limited
5 discovery, then I think that I would ask plaintiffs to identify
6 that in their response papers. But I really don't think I need
7 to do too much. That's my thinking. It does seem to me that
8 it may make sense for the parties to decide whether they want
9 to spend a lot of time and a lot of energy on briefing or
10 whether it makes sense to go to Turks and Caicos and see what
11 is going on down there.

12 So Mr. Soloway, what do you think? Back in ten days
13 or two weeks?

14 MR. SOLOWAY: Sure.

15 THE COURT: That is enough time?

16 MR. SOLOWAY: We don't want to wait on these.

17 THE COURT: I will give you two weeks, but you can get
18 back to me sooner if you want.

19 MR. SOLOWAY: That would be great. I appreciate that.

20 THE COURT: Assuming that plaintiffs want to continue
21 here, then defendants, it is your motion. So how long do you
22 think it is going to take you to make submissions?

23 MS. WYBIRAL: For the Kinay defendants, Halis Sumer
24 and Mer Insaat, could we have 30 days after the plaintiffs
25 respond to the Court to file the motion?

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1 THE COURT: Let me hear from everybody else.

2 30 days after Mr. Soloway gets back to you?

3 MR. ELKIN: Yes. For the Mandarin defendants, that
4 would be fine, your Honor.

5 THE COURT: Nobody is opposed to that?

6 Mr. Soloway, are you OK with that? It is a somewhat
7 complicated motion.

8 MR. SOLOWAY: I am fine with that. My issue in
9 response to that is, I don't know how far in the scheduling we
10 are going to go here. It is us against the world type of
11 thing, so we might want to ask the Court to allow us to stagger
12 our responses, just so that we can manage it. We will be
13 facing probably five or six motions if we go in that direction.

14 THE COURT: Or I give you more time. I give them 30
15 days. I would give you 45 or even 60, if you think --

16 MR. SOLOWAY: Can we address that after we get back to
17 you?

18 THE COURT: You talk to your clients. See what they
19 want to do. Confer with your adversaries. To the extent you
20 want to go forward, why don't you collectively propose then a
21 briefing schedule. If you cannot agree, just tell me where you
22 don't agree in your letter and then I will resolve it.

23 MR. SOLOWAY: I will have you know, that we have
24 worked well with everybody.

25 THE COURT: Let me just commend everyone on your

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1 professionalism and the quality of what you have submitted. It
2 has been interesting, and today is no different and those who
3 spoke did a good job.

4 Let's do that. Two weeks from today puts us at the
5 26th of May. By the 26th of May, let me ask Mr. Soloway to
6 submit a letter indicating to me what the plaintiffs plan to do
7 in terms of going forward or whether they should voluntarily
8 dismiss without prejudice. And if you want to go forward, you
9 can propose on behalf of all parties a briefing schedule. To
10 the extent there are disagreements just lay it out in the
11 letter. Just show it to them before you submit it.

12 MR. SOLOWAY: Thank you, your Honor.

13 THE COURT: Anything else.

14 MR. LINDEMANN: I think I may have misspoken before
15 when you said would Avatar consent to jurisdiction. I don't
16 believe they would, but Avatar is in this case due to a real
17 estate transaction that occurred in Florida.

18 I don't believe that they have any ties to Dellis Cay
19 or anything like that, so I don't believe they would consent to
20 jurisdiction in Turks and Caicos.

21 Just one more thing, your Honor, in my March 31st
22 letter, we were unaware at the time that the property in
23 Florida was actually sold pursuant to a judgment -- to
24 partially satisfy a judgment that was issued in the Turks and
25 Caicos. So we would also like to be able to argue to

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1 plaintiffs' cause of action as there is no fraud there where
2 the Turks and Caicos order and receiver directed the sale of
3 the property, and they are just seeking the real estate
4 commission.

5 THE COURT: 12(b)(6).

6 MR. LINDEMANN: Yes.

7 THE COURT: That's fine. What is one more?

8 So let's stick with that schedule.

9 I will issue a short order that says that the
10 plaintiffs will send me a letter in two weeks.

11 Let me also thank the court reporter.

12 And if anyone wants a copy of the transcript, can I
13 ask you to take that up with the court reporter's office later
14 because I have another matter now.

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